

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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 )  
 In Re: Levaquin Products )  
 Liability Litigation, ) File No. 08-md-1943  
 ) (JRT/AJB)  
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 )  
 ) Minneapolis, Minnesota  
 ) May 26, 2009  
 ) 11:15 A.M.  
 )  
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BEFORE THE HONORABLE **JOHN R. TUNHEIM**  
 UNITED STATES DISTRICT COURT JUDGE  
**(DEFENDANTS' MOTION TO COMPEL - VIA TELEPHONE)**

APPEARANCES

For the Plaintiffs: **RONALD S. GOLDSER, ESQ.**  
**LEWIS J. SAUL, ESQ.**  
**KEVIN FITZGERALD, ESQ.**

For the Defendant: **JAMES DAMES, ESQ.**  
**WILLIAM H. ROBINSON, JR., ESQ.**  
**TRACY J. VAN STEENBURGH, ESQ.**

Court Reporter: **KRISTINE MOUSSEAU, CRR-RPR**  
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Proceedings recorded by mechanical stenography;  
 transcript produced by computer.

11:15 A.M

(In open court via telephone.)

THE COURT: Okay. You may be seated. We are on the telephone today. Counsel, would you note your appearances by telephone today in civil case number 08-1943, In Re: Levaquin Products Liability Litigation.

MR. SAUL: Good morning, Your Honor. This is Lewis Saul, L-e-w-i-s, S, as in Sam, a-u-l, for the plaintiffs.

MR. GOLDSER: Good morning, Your Honor. Ron Goldser for plaintiffs. Thank you for accommodating us by telephone today.

MR. FITZGERALD: Your Honor, Kevin Fitzgerald also for plaintiff.

MR. DAMES: Good morning, Your Honor. John Dames for defendants.

MS. VAN STEENBURGH: Tracy Van Steenburgh for defendants.

MR. ROBINSON: Good morning, Your Honor. Bill Robinson for the defendants.

THE COURT: Okay. Very well. We have the defendants' motion this morning to compel. The Court has reviewed the briefs that were submitted in advance.

Mr. Dames, are you making the argument here?

MR. DAMES: Yes, I am, Your Honor.

1 THE COURT: Go right ahead.

2 MR. DAMES: Since you have reviewed the briefs, I  
3 will be somewhat short on this, but it essentially involves  
4 a request, four requests, that seek the production of  
5 documents obtained by plaintiffs from governmental or  
6 regulatory bodies, domestic or foreign, relating either to  
7 levofloxacin and/or the defendants in this action.

8 In response to these four requests that were  
9 made, there were essentially two objections to it. One was  
10 based on work product privilege, and the second one was  
11 based on the fact that the claim that defendants either had  
12 the documents or they were equally accessible to the  
13 defendants as they were to plaintiffs.

14 The work product doctrine defendants contend is  
15 clearly inapplicable to the documents we seek. We seek the  
16 actual documents obtained from these foreign or domestic  
17 regulatory bodies. Those documents were clearly not  
18 prepared in anticipation of litigation, nor by or on behalf  
19 of plaintiffs or their counsel, and as such, are certainly  
20 not entitled to such protection.

21 Now, I understand plaintiffs are claiming a  
22 narrower universe for their protection, that is they argue  
23 that the selection that they made of those documents, in  
24 fact, the requesting selection itself would show their  
25 mental impressions and betray their work product.

1           Now, we have clearly not sought that. We do not  
2           seek what they actually requested. We seek the underlying  
3           documents themselves, but most importantly, that exception,  
4           the selection process employed, something that would  
5           signify what it is is a very, very narrowly drawn  
6           exception, and the burden is on the plaintiffs to establish  
7           their right for protection.

8           And they have not met the burden by providing the  
9           Court any basis to make a decision as to how these  
10          documents that we seek would actually divulge those mental  
11          impressions. The cases are fairly specific about the fact  
12          that there must be some showing with some specificity. It  
13          cannot be an abstract claim or demand that plaintiffs make.

14          So there is no real basis for anyone to be able  
15          to determine the validity of plaintiffs' claim. Now, in  
16          addition, the argument is that we have the documents. We  
17          can go through in effect the same steps that plaintiffs  
18          did. I think our brief points out, that is not a valid  
19          basis. The courts have flatly disagreed with that claim as  
20          a basis to reject the need to produce documents.

21          I do want to raise, and I think frankly it's so  
22          clear, I won't spend any time on that, but I will spend  
23          some time on a claim being made by plaintiffs subsequent to  
24          I think the briefs being filed, and that is that we have  
25          objected to foreign regulatory documents. Therefore, how

1 can we with a straight face demand plaintiffs produce the  
2 very same documents that we have objected to in the past,  
3 although I think it not a legitimate response to our  
4 motion. At this point in time, I think it does, however,  
5 deserve a response by us.

6 Number one, that objection on foreign regulatory  
7 documents was made in 2007. Subsequent to that time, the  
8 practice of the defendants in responding to discovery has  
9 in fact rendered that objection moot. Our witnesses have  
10 responded to questions concerning foreign regulatory  
11 actions.

12 We have described through our witnesses the fact  
13 that this product is marketed by us pursuant to an  
14 agreement with Daichi, and we do not have the right to  
15 market the product in Europe, nor in Asia, and in fact we  
16 do not communicate, and this has been described in the  
17 deposition. The company did not communicate with foreign  
18 regulatory action. That is the province of our partners  
19 pursuant to the marketing agreements.

20 The correspondence we have with the partners and  
21 whatever they have sent us concerning levofloxacin and  
22 actions by foreign regulatory agencies have been part of  
23 the discovery process we made without objection to  
24 plaintiffs. So there has already been examinations based  
25 upon French regulatory considerations, concerns on the part

1 of events as to what those actions might entail.

2 I could go on from there, but quite simply, in  
3 practice, in responding to the issues in the case, we have  
4 determined that in fact we would not rest on that  
5 objection, and we had our witnesses respond to the, both  
6 the questions, and we responded with a document that we had  
7 in our possession from our partners that related to the  
8 foreign regulatory agencies.

9 We don't have direct communications or direct  
10 filings with any of them, and that is why we don't have  
11 documents from them directly. So -- and that's why I think  
12 it's worthy of telling the Court because I do think  
13 underlying so much that goes on in the case, even though  
14 there may not be a precise quid pro quo, it still  
15 deserves -- we needed to establish to the Court that we are  
16 not trying to be hypocritical or two-faced about this, but  
17 that's enough of that, I believe.

18 I think the, this response objecting based on  
19 work product, and I will just sum up, does not -- without  
20 more, there can be no ability for the Court to actually  
21 make concrete plaintiffs' abstract claim that producing the  
22 documents requested by defendants would somehow divulge  
23 their mental processes and impressions and strategies.

24 Nothing that we have requested requires any of  
25 that. Nothing plaintiffs have identified gives us a clue

1 as to what those might be, and frankly, I think the central  
2 case that we cite on the precise issue is *Federal Deposit*  
3 *Insurance Corporation versus Wachovia Insurance Services* of  
4 the March 19th, 2007, decision of the United States  
5 District Court.

6 The citation is in our brief, but there the  
7 precise issue concerning the selection process that the  
8 party from which discovery was sought made, there was no  
9 sufficient showing made in that case, much like in this  
10 case, to be able to have the Court rest a decision as to  
11 whether the claim and the burden have been sustained.

12 So if the Court has any questions, I would be  
13 happy to respond, but that's it for me.

14 THE COURT: Mr. Dames, hear me okay?

15 MR. DAMES: Yes, I do, Your Honor.

16 THE COURT: Okay. Now, I recognize your argument  
17 that it's not valid, the fact that these documents might be  
18 otherwise accessible, not a valid argument. I'm just  
19 wondering. Why are these documents not equally available  
20 to the defense through the normal sources of getting these  
21 documents?

22 MR. DAMES: Well, I suspect that since they are  
23 obtained from foreign regulatory agencies or domestic that  
24 we could submit an FOI request ourselves to those foreign  
25 regulatory agencies or to the FDA, seeking the universe of

1 documents they may have or that they produce.

2 We decided to do it this way so that we would  
3 know what was provided, the whole universe of documents  
4 that were provided by the foreign regulatory agencies  
5 and/or the FDA in this manner. I'm not certain that we  
6 have to use the public manner versus the discovery manner  
7 in a proceeding.

8 I mean, I don't know that there is any  
9 requirement for our request that we proceed with the same  
10 public request made by plaintiffs ourselves to get those  
11 documents, but I don't deny that we could have done Freedom  
12 of Information Act requests. They are prolonged at this  
13 point, with the FDA can take a significant amount of time.

14 And I, frankly, I have to confess ignorance as to  
15 the steps needed to take to get documents from foreign  
16 regulatory agencies. I don't deny that we, too, could go  
17 to these bodies and make the appropriate requests. We  
18 might or might not get the same response, but that might be  
19 just the vagaries of bureaucratic inconsistencies, but we  
20 certainly could have done it. That is one way to do it.

21 THE COURT: But part of your response is, you  
22 would have, you would then know what had been provided to  
23 the plaintiffs. Doesn't that get at the possibility of  
24 discovering insight into initial litigation strategies  
25 which may at least in some way implicate the work product



1       privilege?

2               MR. DAMES: I don't believe so, Your Honor,  
3       because that would be an exception then that would swallow  
4       the rule. That is, if plaintiffs can always avoid by  
5       making requests independently of the discovery process in  
6       court of any outside body, if they can cloak and protect  
7       themselves by suggesting that their request itself would  
8       betray or divulge some sort of mental process about the  
9       case, then we don't really have an exception anymore.

10              We just have a blanket privilege, and there is no  
11      way of knowing. We're not seeking the request itself or  
12      what they sent to the regulatory agency seeking the  
13      information. We're just seeking the actual documents, and  
14      I have this sneaking suspicion, and since I don't have the  
15      response, I guess it remains sneaking, that we will find  
16      that the universe of documents will not really give a clue,  
17      other than the broad subject matter of what was being  
18      sought, to any strategies themselves.

19              So any document divulged in discovery of one  
20      party to another somehow can't betray a certain amount of  
21      the strategies of the party producing those documents. I  
22      mean, I don't know how we can argue against their work  
23      product privilege with, based on what we have before us.

24              We don't even, we don't even know the category of  
25      documents that they have. We don't know the number of

1 documents that they're claiming privilege from. We don't,  
2 I mean, we know nothing to make specific the broad claim of  
3 privilege that they, that they make.

4 And so it is, this argument right now becomes an  
5 abstract one, and I, you know, making arguments in the  
6 abstract are very difficult when you're seeking specific  
7 items in discovery. So I don't know how to respond to the  
8 Court other than, I guess in theory it's possible that an  
9 element of strategy can be divulged, but, you know, that's  
10 theoretical, and the cases have held that if it's  
11 theoretical, it remains insufficient.

12 THE COURT: One more question, Mr. Dames. Thank  
13 you. To the extent that there is a claim that there may be  
14 undue hardship to discover these documents on your own, so  
15 to speak, is it the cost and time involved in foreign  
16 litigation and the actual time involved in any type of  
17 contact with foreign regulatory authorities?

18 MR. DAMES: It's time more than cost.

19 THE COURT: Okay.

20 MR. DAMES: I don't know what the costs would be,  
21 so I'm uncomfortable with suggesting that there is some  
22 sort of prohibition of cost, and I just, through the phone  
23 lines I can sense that plaintiffs would suggest if they can  
24 afford the costs we can afford the costs, and they're  
25 probably right.

1 I think it's more the time element, but I also --  
2 this is not an attempt to entrap plaintiffs to divulge  
3 their mental processes, that we could have just gone off  
4 and done this ourselves but we have chosen a more devious  
5 method to get it from them so we would know, you know, what  
6 they were focusing on and it would give us some sort of  
7 indication of where they were heading.

8 That is certainly not the intent. I mean, I --  
9 it just isn't the intent. We want the universe of  
10 documents that they obtained, and it's probably at this  
11 point much quicker to get them from plaintiffs, and again,  
12 I just repeat. There isn't an obligation to compel parties  
13 to get documents from one method versus another method,  
14 assuming that the -- each method is actually legitimate on  
15 its own.

16 So we go back to whether the work product  
17 privilege is actually a valid privilege to invoke, but I'm  
18 not, I don't believe there is any requirement in the case  
19 law that we choose one method versus another.

20 THE COURT: Okay. Thank you, Mr. Dames.

21 Mr. Saul?

22 MR. SAUL: Yes, Your Honor. Thank you. There is  
23 really nothing abstract here at all. What Mr. Dames does  
24 not say in his argument is why they need these documents.  
25 I realize the burden shifts to us, but in this case from

1 the beginning when they asked for these documents, I asked  
2 myself why do they need these documents.

3 The only reason that they need these documents  
4 are to look into our litigation strategy, not only what we  
5 obtained and what we know, but also to determine what we  
6 don't know, so they can form their litigation strategy.  
7 This is an adversarial procedure. We requested these  
8 documents a year and a half or two ago, a year and a half  
9 to two years ago.

10 We did this after suit was filed. We did this in  
11 anticipation of litigation. This is our work product, and  
12 it does lay a road map, the documents that we obtained, as  
13 to our litigation strategy, and the defendants have not  
14 given one reason other than time for the need for these  
15 documents.

16 Now, to address the issue about that they don't  
17 have time to do it, they knew a year and a half or two  
18 years ago that we requested these documents because when we  
19 requested, I'm not going to say what agency, but from a  
20 particular agency in Europe these documents, the agency  
21 wrote to them telling them that we wanted these documents,  
22 do you have any objection to releasing them.

23 So this argument that Mr. Dames is making, and  
24 it's a good argument, he argues well, but I don't think it  
25 can carry the day that we didn't know about -- that it's a

1 time issue now that I don't think that that, that, that  
2 that should carry the day.

3 Mr. Dames also cited a case in which we cited in  
4 our brief and said that it stood for the proposition that  
5 he brings forward, and that case was the case *Federal*  
6 *Deposit Insurance Corp versus Wachovia*, and in that, the  
7 court said, Whereas in the instant case, the documents  
8 sought already are in the possession of or are readily  
9 available to the party seeking them, the implication is  
10 that the request is being promulgated not to obtain  
11 relevant information but with a precise goal of learning  
12 what the opposing attorney is thinking or strategy may be,  
13 and that's exactly what they're doing here, Your Honor.

14 In fact, we have a motion that we will be filing  
15 shortly after we have the meet and confer, and I suggested  
16 to the Court during the last hearing that you might want to  
17 give them simultaneously to try to do it this way, but what  
18 has happened is, we can't get documents. So the defendants  
19 said, tell us what documents you want in preparation for  
20 doctor X's deposition, and we will find them for you.

21 So we have to tell them the documents. They go  
22 and look for them, and they know our strategy. This is  
23 another part of them attempting to learn our strategy.  
24 These documents are available to the defendants as they  
25 were to the plaintiffs.

1 In fact, in objections that the defendant filed  
2 in this case, they said the following. Objection number 8  
3 in, in their objections to our discovery, Ortho-McNeil  
4 objects to any plaintiffs' discovery can be broadly  
5 construed to require us to search for and disclose  
6 information and documents that are a matter of public  
7 record or otherwise equally accessible to plaintiff as to  
8 Ortho-McNeil.

9 The entire time they have been taking opposition  
10 notwithstanding Mr. Dames said that they testified to  
11 these. They have not given us these documents as far as we  
12 can tell, although we can't search the databases properly,  
13 but the bottom line here is that the reason they are  
14 seeking this information, they want to learn how we are  
15 approaching this case, what we know and what we don't know.

16 And these documents that we have, we intend to  
17 use them at trial. They're our work product. That's what  
18 the rules created were to allow the work product to stay  
19 that of the attorneys until the appropriate time, and we  
20 ask that their motion be denied.

21 THE COURT: Mr. Dames, anything else?

22 MR. DAMES: No, Your Honor, not really. I just,  
23 I guess I just, the only thing I would do is reiterate that  
24 the concern on the part of the Court in *Wachovia* about  
25 drawing the existence of the sport exception very narrowly,

1 and there in that case there was a number of documents  
2 selected by an attorney out of thousands of others and  
3 given to his client in preparation for the upcoming  
4 deposition, and the argument was the actual culling out of  
5 those documents and selecting only some of them to show to  
6 his client. Those were the mental impressions and thought  
7 processes of the attorney. That was more properly the  
8 existence of a work product protection privilege.

9 We don't have that here. We haven't requested  
10 for something that plaintiffs from the universe of  
11 documents they have that cull out from them so that we  
12 would know from that universe which ones they precisely  
13 thought were important in their strategy of the case.

14 So all I can say is, again, I think we're left  
15 with a speculative basis upon which to rule in favor of the  
16 privilege based on the record the plaintiffs have presented  
17 the Court, and that's all I have.

18 THE COURT: Mr. Saul, did you have anything else?

19 MR. SAUL: Nothing further, Your Honor.

20 THE COURT: Okay. Thank you, Counsel, for the  
21 arguments this morning. I am going to grant the  
22 defendants' motion to compel. Generally the Court is in  
23 favor of broad sharing of documents during the discovery  
24 process. It is particularly true in a case like this, and  
25 it applies equally to both sides.

1 I do think that having examined this matter  
2 carefully that the danger of revealing litigation strategy  
3 in a broadly worded request like this is somewhat slight.  
4 I don't find that this is protected by the work product  
5 privilege, and I do think there is some, albeit minor, but  
6 there is some savings of time, and that perhaps is a  
7 hardship at this stage of the litigation.

8 The defense surely could have obtained these  
9 documents themselves. I don't see that they would have --  
10 they would have been inaccessible to the defense, but given  
11 the time factor which the Court is conscious of and the  
12 Court's belief that there is, there would be little if any  
13 litigation strategy revealed by production of these  
14 documents, the Court will grant the motion and remind the  
15 defense as well that the Court has a view that there should  
16 be broad sharing of documents during the discovery phase of  
17 this case.

18 Anything else for today from you, Mr. Dames?

19 MR. DAMES: No, Your Honor.

20 THE COURT: How about you, Mr. Saul?

21 MR. SAUL: No, Your Honor. Thank you.

22 THE COURT: Okay. Thank you. We'll be in  
23 recess, and, Mr. Saul, did you indicate that you would be  
24 filing a motion to compel as well?

25 MR. SAUL: Yes. We will be filing an omnibus



1 motion to compel. It will be quite complicated and  
2 involved, and we also, Your Honor, we don't think that we  
3 can do the discovery necessary for the bellwether  
4 plaintiffs in time to meet the discovery deadline, so we  
5 will be bringing that issue to the Court's attention.

6 THE COURT: Okay. Very well. We will get that  
7 on for a hearing either in person or by telephone, whatever  
8 the parties prefer, just as quickly as we have all the  
9 response and replies in. Okay?

10 MR. SAUL: Thank you, Your Honor.

11 MR. DAMES: Thank you, Your Honor.

12 THE COURT: Okay. We will be in recess. Thank  
13 you.

14 THE CLERK: All rise.

15 \* \* \*

16 I, Kristine Mousseau, certify that the foregoing  
17 is a correct transcript from the record of proceedings in  
18 the above-entitled matter.

19  
20  
21  
22 Certified by: s/ Kristine Mousseau, CRR-RPR  
23 Kristine Mousseau, CRR-RPR  
24  
25